Supreme Court, U.S.
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No. 90-6531

In The

Supreme Court of the United States

October Term, 1990

KEITH J. HUDSON,

Petitioner,

vs.

JACK McMILLIAN, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

JOINT APPENDIX

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UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF LOUISIANA

KEITH J. HUDSON #91888
Camp J – Cuda 1-R-3
Angola, Louisiana

Enter above the full name of the plaintiff or plaintiffs in this action

VERSUS

CSO II Jack McMillian
CSO II Marvin Woods
Lt. Arthur Mezo

Enter above the full name of the defendant or defendants in this action

COMPLAINT

I. PREVIOUS LAWSUITS:

a. Have you begun other lawsuits in state or federal court dealing with the same facts involved in this action or otherwise relating to your imprisonment?

Yes ( ) No (X)

b. If your answer to A is yes, describe each lawsuit in the space below. (If there is more than one lawsuit, describe the additional lawsuits on another piece of paper, using the same outline.)

1. Parties to this previous lawsuit

Plaintiffs: _____

_____

Defendants: _____

_____

2. Court (if federal court, name the district; if state court name the parish):

_____

_____

3. Docket number: _____

4. Name of Judge to whom case was assigned:

_____

5. Disposition (for example, was the case dismissed? Was it appealed? Is it still pending?):

_____

6. Approximate date of filing lawsuit: _____

7. Approximate date of disposition: _____

II. PLACE OF PRESENT CONFINEMENT: La. State Penitentiary, Angola, La.

a. Is there a prisoner grievance procedure in this institution?

Yes ( ) No (X)

b. Did you present the facts relating to your complaint in the prisoner grievance procedure?

Yes ( ) No (X)

c. If your answer is YES:

1. What steps did you take? There is no grievance procedure. However, letters were written to the Camp Supervisor Major D. Klone [sic] and Warden Ross Maggio, Jr.

2. What was the result? Major Kalone having personally seem [sic] my condition had me sent to the hospital then placed in Administration Ld.

d. If you answer is NO, explain why not? There is no prisoner grievance procedure employed here and only the above mention [sic] action was taken.

III. PARTIES:

(In item A below, place your name in the first blank and place your present address in the second blank. Do the same for additional plaintiffs, if any.)

a. Name of plaintiff: Keith J. Hudson #91888

Address: La. State Pen., Angola, La. Camp J Cuda 1-R-3

(In item B below, place the full name of the defendant in the first blank, his official position in the second blank, and his place of employment in the third blank. Use item C for the names, positions, and places of employment of any additional defendants.)

b. Defendant CSO II Jack McMillian is employed as Correctional Sargant [sic] at La. State Pen. Camp J

c. Additional Defendants: CSO II Marvin Woods and Lt. Arthur Mezo, all are employed at La. State Penitentiary as Correctional Officers at Camp J

IV. STATEMENT OF CLAIM:

State here as briefly as possible the FACTS of your case. Describe how each defendant is involved. Include also the names of other persons involved, dates and places. DO NOT GIVE ANY LEGAL ARGUMENTS OR CITE ANY CASES OR STATUTES. If you intend to allege a number of related

claims, number and set forth each claim in a seperate [sic] paragraph. (Use as much space as you need. Attach extra sheets if necessary.)

SEE ATTACHED

I.

On the morning of October 30, 1983, I was written up by Officer Marvin Woods who claimed I had called him all types of disrespectful names, which allegation is untrue and merely instigated by officer Jack McMillian, who has a background and reputation for unjust and unnecessary harrassment [sic]. Lt. Mezo came to the area and wanted to know what the problem was and I explained to him that these officers were harrassing [sic] me for no vaild [sic] reason and that I had been written up also for no vaild [sic] reason. At this time Officer Woods told me that I had better shut my mouth if I knew what was good for me. When I asked him why he was threatening me he stated that he was and what could I do about it. I asked Lt. Mezo did he hear that and he said "No"; inmate Edward Allen stated that he heard it. Lt. Mezo told Allen that he had better shut [sic] before he would be in for it also. Allen tried to explain that these two officers were harrassing [sic] for no reason. Lt. Mezo told both Edward Allen and myself to pack our stuff that we were going to lockdown.

II.

While waiting to be transferred to administrative lockdown I was given two disciplinary reports (1) alleging that inmate Allen and I were arguing with each other and that we had to be locked up because we were creating a disturbance on the teir [sic], (2) and the other was for alleged obscenity to an officer; neither are lock up offenses and these charges were only engineered for insidious reasons.

III.

After being handcuffed & Shackled and under full restraint, I was led from my cell into the lobby of Cuda 1, and at that time Officers Woods and McMillian began shoving me against the wall, and Lt. Mezo motioned with his hands, and these officers took me outside on the walk way of Cuda and began punching me in the face and kicking me; officer McMillian told officer Woods to hold me still so he could knock my gold teeth out of my mouth, and officer McMillian began punching me repeatedly in the mouth, and at that time Lt. Mezo came outside and said "don't have to [sic] much fun", and officer Woods was hitting me in the back and then walked me to Cuda 3 door where I was then taken to Cell #9 in lockdown.

IV.

After being uncuffed inside the cell, bleeding and swelling about the face and brusied [sic] about the body, I asked to be taken to the hospital for my injuries which were extensive. Officer Woods told me to catch sick call and then Lt. Mezo came to my cell and asked me what the problem was attempting to make the inmates in lockdown think he was unaware of what had happened to me. I told Lt. Mezo that he knew that I need [sic] to go to the hospital and he knew what the problem was, Lt. Mezo then told me that nothing was wrong with me and walked off.

After the shift changed I requested of CSO II Wendell Arnold to see the Captain or Lt. the time was approx. 5:a.m. At approx. 11;30 [sic] a.m. Lt. Dubroc came and I asked him to please allow me to go to the hospital and he told me to hold on; I waited all day until 6: p.m. when the shift had changed again and the same shift that had abused me had come back on duty, Captain L. Dupont came to my cell and asked what had happened, but before

I could explain Lt. Mezo whispered in his ear and they walked off.

Monday October 31, 1983 upon shift change again I asked Officer Glynn Blades to see the Lt. or Captain, this officer ignored me. When I received breakfast I told Cadet King that I couldn't eat and I needed to see the Captain or Lt. and he replied "Ok". I saw nobody until I went to D.B. Court. I informed the Court that I had been beaten, however, the court was not interested in my explaination [sic] even though it was apparent that I had been beaten and had received no type of medical treatment. They said that their only concern was the reports before then [sic] and not me, the D.B. Board was Major James Teer and a Classification Officer by the name of Williams and I was represented by inmate counsel Tony Roberts. After leaving Court I saw Capt. Merridth and asked him could I go to the hospital, Capt. Merridth told me this and I quote "I would like to but if I send you over there now they are only going to say that you did it to yourself."

Upon shift change I asked to see the Capt. or the Lt., at maybe 11:p.m. Capt Cole came and I explained my stroy [sic], and he told me that I would be placed on sick call. On November 1, 1983 I was [sic] the Medical Technician and gave him my jnjuries [sic]. Late [sic] on during the day Major Kalone came and talked to me and asked my problem and I told him about the whole incident, he left and later I was told that I was going back to my living quaters [sic] and then I was taken to the Hospital and examined by a doctor who checked my injuries and had me put on call out to see the dentist.

V. **RELIEF:**

State briefly exactly what you want the court to do for you. MAKE NO LEGAL ARGUMENTS. CITE NO CASES OR STATUTES.

That I be awarded compensatory damages in the amount of Fifty Thousand ($50,000.00) Dollors [sic] for physical, mental, and emotional anguish due to the unjust and unnecessary beating given by the defendant and the total disregard for providing medical treatment by the ranking security personel [sic]. And further that injunctions be placed against the officers directly involved to prohibit further crulity [sic] to myself and other inmates housed at Camp J.

Signed this _____ day of _____, 19 ___.

_____

_____

_____

(Signature of Plaintiff or Plaintiffs)
(Jurat Omitted In Printing)

_____

D-1

CA83-1385-1
10/30/83 3:00

TO: Major Davie Kelone

Sunday morning. . . .

FROM: Inmate Keith J. Hudson
Camp J. Cuda #1-R-3

Copy:

RE: Harrassment, [sic] Beating, Denied Medical Treatment by Lt. Mezo CSO Marvin Woods CSO Jack McMiller

Dear Sir;

On the above date and time, while cleaning up my cell accordingly to posted policy, Officer Jack McMiller, shouted and told me to, "get my black ass to sleep," and I know that there aint no rule posted stating when an inmate should sleep, and this officer came down the tier calling me all kind of bitches & whores, and I refused to answer his profanity, and was written up.

(Harrassment [sic])

Lt. Mezo came and CSO Marvin Woods, trying to provoke me to get me gassed down, but I kept my silence, and was called "sorry mother fucker" by Officer Woods, and was told by the Lt. to pack my shit! (for no reason) So I packed my property and lift it in my cell, and on my trek to Adm. L/d, CSO Woods & McMiller began punching me in the face, and kicking me, and lacerated my lip and loosen [sic] my teeth, and I asked to go to the hospital, and was told to catch sick call, and I would

appreciate an imediate [sic] investigation, which shall be followed up on by a civil suit.

Sincerely,

/s/ Keith Hudson
#91888

D-2

DISCIPLINARY REPORT

PART 1- DISCIPLINARY REPORT

1. Name of Prisoner	2. Number	3. Date of Incident
Keith Hudson	91888	10-29-83

4. Time of Incident	5. Place of Incident
2:50 am	Cuda 1 R 3

6. Job Assignment(Prisoner)

Ext L/D

7. Housing Assignment(Prisoner)

Cuda 1 (J HOLE)

8. Rule Violated	9. Rule Number
Defiance	3

10. Description of Incident (Include all relevant information, use other side, if necessary)

On the above date and time the abovenamed and numbered inmate was arguing with the inmate in cell #4. I gave the above inmate several direct verbal orders to stop the loud disturbance but he refused and told [sic] to get the fuck out of his face you sorry mother fucker.

11. Signature of reporting employee

/s/ Marvin Woods

12. Name, Title, Assignment (PRINT)

Marvin Woods, CSO II

13. Report (copy) given to above prisoner by:

MW

14. Plea by Prisoner: [X] Not Guilty [ ] Guilty

15. Verdict: [ ] Not Guilty [X] Guilty

16. Date of Hearing

10-31-83

17. Counsel Substitute (Counsel)

/s/ S Roberts

18. Summary of the evidence and reasons for the decision:

Inmate found guilty basedon [sic] Inmate Hudson's only defense was a denial of the report and the credibility of the officers statements. The senteence [sic] was based on Inmate Hudson's very poor conduct record

19. Sentence Suspended

combine 2 reports 10 days isol [ ]

20. Disciplinary officer:

21. Disciplinary Board: /s/ Illegible Chairman

_____ Member

/s/ Illegible Member

Sign 7 copies. (Give inmate one copy and forward 6 copies to disciplinary office).

D-3

11-2-83

TO: DAVY KELONE, MAJOR

FROM: GARY DUBROC, LT.

RE: STATEMENT

ON 10-30-83 THERE WAS ONLY ONE INMATE THAT REQUESTED TO GO TO THE HOSPITAL ON THIS DATE AND THAT INMATE WAS JOHN POULLARD ON GATOR-3-LEFT BECAUSE OF CHEST PAINS. THIS INMATE WAS SENT TO THE NGH AT 3:30 P.M. NOTHING ELSE UNUSUAL THAT I COULD FIND ON THIS DATE.

GARY DUBROC, LT.

/s/ Gary Dubroc, Lt.

D-4

11-2-83

TO: MAJOR KELONE

FROM: MARVIN WOODS, CSO II

RE: KEITH HUDSON, #91888

ON THE MORNING OF 10-30-83 AT APPROXIMATELY 2:40 A.M. I WENT DOWN THE TIER ON CUDA-1 RIGHT BECAUSE INMATE HUDSON AND INMATE EDWARD ALLEN WERE CAUSING A DISTURBANCE. I WENT DOWN THE TIER AND GAVE THE ABOVE INMATES SEVERAL DIRECT VERBAL ORDERS TO STOP HOLLERING. AFTER SEVERAL DIRECT VERBAL ORDERS, INMATE HUDSON STARTED HOLLERING AND CURSING AT ME. I TOLD CSO II MCMILLIAN CALL THE LIEUTENANT. LT. MEZO ARRIVED ON CUDA UNIT AND TOOK CHARGE OF THE SITUATION. LT. MEZO AND I ESCORTED INMATE HUDSON TO ADM. L/D. AT NO TIME DID I OR LT. MEZO USE ANY PHYSICAL FORCE ON THIS INMATE.

MARVIN WOODS, CSO II

/s/ Marvin Woods
Sgt.

D-5

SICK CALL SHEET

Date 11-1-83

Name /s/ Keith Hudson Number 91888 Location J

Complaint: Teeth

J.G.D.

Treatment or Prescription:

Dental Illegible

7-20-83 T PC

/s/ (illegible)

Medical Specialist

D-6(1)

11-2-83

TO: DAVY KELONE, MAJOR

FROM: JACK MCMILLIAN, CSO II

RE: KEITH HUDSON, #91888

ON THE MORNING OF 10-30-83, LT MEZO WAS CALLED ABOUT A DISTURBANCE ON CUDA-1-RIGHT TIER.

LT. MEZO CAME DOWN TO TAKE CONTROL OF THE SITUATION. INMATE KEITH HUDSON BEGAN HOLLERING AND CURSING AT OFFICER WOODS WHO WAS ON THE TIER WITH LT. MEZO. INMATE HUDSON WAS ESCORTED TO ADM. L/D BY LT. MEZO AND CSO II WOODS. AT NO TIME DID I, KICK, HIT OR USE ANY OTHER TYPE FORCE ON INMATE KEITH HUDSON.

CSO II JACK MCMILLIAN

/s/ Jack McMillian
c-team CSO II

D-6(2)

11-2-83

TO: DAVY KELONE, MAJOR

FROM: LT. ARTHUR MEZO

RE: KEITH HUDSON, #91888

ON 10-30-83 AT APPROXIMATELY 2:45 A.M., I WAS CALLED TO CUDA UNIT BY CSO II JACK MCMILLIAN

WHO TOLD ME THAT TWO INMATES ON CUDA-1-RIGHT TIER WERE ARGUING LOUDLY AND COULD NOT GET THEM QUIET. WHEN I ARRIVED ON CUDA UNIT, I FOUND OUT THAT IT WAS INMATE KIETH [SIC] HUDSON, #91888 AND EDWARD ALLEN, #92784 IN CELLS CUDA-1-RIGHT 3&4, RESPECTIVELY WHO WERE ARGUING. BOTH INMATES WERE WRITTEN UP FOR VIOLATION OF RULES #3 & #5 AND WERE PLACED IN ADM. L/D.

PER MEMORANDUM, I PERSONALLY ESCORTED BOTH INMATES, SEPARATELY, FROM CUDA-1-RIGHT TO ADM. L/D ON CUDA-3 AND AT NO TIME DID CSO II MCMILLIAN OR CSO II WOODS NOR I, HIT, KICK, OR USE ANYOTHER [SIC] TYPE OF PHYSICAL FORCE ON INMATE HUDSON, AS HE STATES IN HIS LETTER. CSO II MCMILLIAN WAS NOT EVEN AROUND INMATE HUDSON ON HIS WAY TO ADM. L/D. CSO II MCMILLIAN REMAINED ON CUDA 1&2.

AT NO TIME DURING THE REMAINDER OF THE SHIFT, SUNDAY MORNING, NOR THE SHIFT OF 10-30-83, SUNDAY EVENING, DID INMATE HUDSON BRING TO MY ATTENTION THATHE [SIC] NEEDS MEDICAL TREATMENT, NOR DO I RECALL BEING ON THE TIER, CUDA-3-LEFT, WHILE CAPTAIN DUPONT TALKED TO INMATE HUDSON OR IF CAPTAIN DUPONT TALKED TO HIM AT ALL.

I AGAIN DENY ALL ALLEGATIONS BROUGHT TO YOUR ATTENTION BY INMATE HUDSON AS I ASSURE YOU INMATE HUDSON WAS PLACED IN ADM. L/D FOLLOWING ALL RULES, REGULATIONS AND PROCEDURES SET FORTH BY THE LOUISIANA STATE

PENITENTIARY, DEPARTMENT OF CORRECTIONS, AND CAMP "J".

LT. ARTHUR MEZO

/s/ Lt Arthur C Mezo

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

KEITH J. HUDSON — CIVIL ACTION

VERSUS — NUMBER 83-1385-A

JACK McMILLIAN, CSO III, ET AL

OPINION

This matter is before the court following a trial on the merits on March 10, 1987.

Plaintiff, an inmate at Louisiana State Penitentiary, Angola, Louisiana, brought this action pursuant to 42 U.S.C. § 1983 against corrections officers Jack McMillian, Marvin Woods and Arthur Mezo.

The plaintiff had consented to disposition of this case by a magistrate pursuant to 28 U.S.C. § 636(c) on November 26, 1986 and the defendants consented on December 9, 1986. An order of reference was entered on December 11, 1986. When the case was called for trial, the plaintiff moved for a continuance, which was denied. The parties were then requested to confirm on the record that they had consented to trial before the magistrate. *Archie v. Christian,* 808 F.2d 1132 (5th Cir. 1987). The defendants affirmed their consent, but the plaintiff stated he wished to revoke his consent. Plaintiff stated no reason for wishing to do so.

While consent must be voluntarily given, there is no corresponding right to revoke it if later developments in the case, now before the magistrate, indicate to a party

that tactically he would be better off before a district judge. Although one district judge or magistrate may be more or less lenient with a pro se litigant in terms of how a case is tried or may evaluate a pro se plaintiff and his witnesses more or less favorably than another judge or magistrate, these considerations are not sufficient to permit a party who has voluntarily consented to a bench trial before the magistrate to withdraw that consent immediately before the trial begins. *See, Southern Agriculture Co. v. Dittmer,* 568 F.Supp. 645 (D. Ark. 1983).

Nor does the fact that in this particular case the magistrate could have converted the trial to an evidentiary hearing under section 636(b)(1)(B) and the district court's original reference of this case to the magistrate on June 4, 1984 justify allowing the plaintiff to revoke his consent. For his own reasons, the plaintiff consented. He did not indicate that his consent was coerced or given under any threats. *See, Adams v. Heckler,* 794 F.2d 303 (7th Cir. 1986). His attempt to revoke it following immediately on the heels of a denied motion for a continuance was an obvious attempt to delay the trial at the last moment. Therefore, the plaintiff's revocation of his consent will not be accepted.

This case involves an alleged beating of the plaintiff by defendants McMillian and Woods. Plaintiff also claims that Mezo, a lieutenant, stood by while the other two defendants beat the plaintiff. Plaintiff further claims that the defendants denied his repeated requests for medical attention.

Edward Allen testified that on October 30, 1983 in the early morning hours he was housed on the same tier as

the plaintiff at Camp J in an adjacent cell. An argument occurred between him and the plaintiff, but no real disturbance took place. Plaintiff had been washing his clothes in his cell. Woods came down the tier and "had words" with the plaintiff. McMillian also approached the plaintiff's cell and told the plaintiff to shut up. Allen said Woods had what he characterized as a nasty attitude toward inmates.

While Allen said he could hear what was going on, he could not see it clearly because of the way the cells are constructed. He saw the plaintiff being removed from his cell. Then, he testified, he heard the plaintiff hollering and what sounded like "licks" – blows – being "passed." Later Allen was removed from his cell and also beaten by Woods and McMillian.

Later, the plaintiff told Allen he had been beaten and his mouth had been injured. Plaintiff showed Allen his face, mouth and broken front brace. Allen specifically recalled a bruise on the plaintiff's lip. Allen testified that when the plaintiff left his cell he was handcuffed and shackled, offered no resistance and was not visibly bruised or swollen.

On cross examination, Allen confirmed that he recognized the voices of McMillian and the plaintiff as he, Allen, had been on that tier for a few months and the plaintiff was there when he arrived. Also, Woods and McMillian had been working there also before his arrival.

Allen testified that McMillian kept speaking to the plaintiff in a provocative manner.

Allen said he was aware that the plaintiff had written to Major Dave Kelone to complain about the incident and asked for an investigation (Exhibit D-1), but did not recall actually seeing the letter nor whether Kelone spoke to him, Allen, during the investigation.

Inmate Earl Truvia also testified that on October 30, 1983 he was housed at Camp J, Cuda 3-4 Unit. He heard a commotion early that morning at about 1:45 a.m. which sounded like punches and scuffling and he heard screams.

On November 1, 1983 he saw the plaintiff in the yard. Plaintiff had bruises on his lip and over one eye, and a swollen cheek. He saw no blood or cuts. Plaintiff told Truvia he was involved in an incident with the security guards.

Truvia admitted that he did not see any scuffle and that the time could have been as late as 3:00 or 4:00 a.m., but he thought it was between 1:45 and 2:30 a.m. Truvia could not tell from the sounds he heard whether it was the plaintiff involved in the scuffle, and he heard only one incident.

Hudson testified that he had an argument – "passed words," as he calls it – and McMillian said he would be back with something for the plaintiff. McMillian came back shortly and the two had more words. McMillian told the plaintiff to pack his belongings because he was going to the dungeon (administrative lockdown). Woods arrived to assist McMillian. After leaving his cell in restraints, Woods and McMillian walked with the plaintiff to administrative lockdown. On the way, plaintiff testified, McMillian commented to Woods about knocking

the plaintiff's teeth out and then McMillian punched the plaintiff in the eye, chest and mouth, while Woods held the plaintiff by the back of the plaintiff's jumpsuit and kicked and punched the plaintiff in the back. Plaintiff testified that Mezo came out and told them "not to have too much fun."

Plaintiff testified that he asked Captain James Cole also to put him on the sick call list. Plaintiff emphatically testified that he did tell the sick call man he had been beaten. Plaintiff stated he had no problems with his partial plate prior to this incident. The plate was not usable until it was repaired in February 1984, plaintiff testified. In the meantime, he could eat satisfactorily, although it felt strange.

Plaintiff testified that when he went to his disciplinary board hearing he asked to be sent to the hospital, but the board refused to discuss his request.

Defendants called Officer James Cole. He testified that normally the shift supervisor or an escort officer escorts an inmate to lockdown. An officer who abuses an inmate is subject to disciplinary action, and probably discharge, in an incident such as the one described by the plaintiff. He added that if an incident of the use of force is reported it is investigated to either confirm or refute the allegations. This procedure is for the protection of the officer if the charges are unfounded. Cole did not recall seeing the plaintiff on October 31, 1983 nor did he recall any incident of brutality at Camp J.

Gary Dubroc testified that he was a sick call man at Camp J in 1983. He said he saw the plaintiff on October 31 or November 1, 1983 but the plaintiff did not ask to be

sent to the hospital. He added that if the plaintiff had told him that security officers had beaten the plaintiff, he would have sent him to the hospital. Dubroc admitted on rebuttal that the sick call sheet dated November 1, 1983 (Exhibit D-5) was not signed by him.

Marvin Woods denied that he used any force whatsoever against the plaintiff. The plaintiff was taken to lockdown by Lt. Mezo and himself, while McMillian remained behind. Woods testified that the plaintiff and Allen were arguing about the noise the plaintiff was making hand washing some clothes in his cell. Woods handcuffed the plaintiff and Mezo went with Woods and the plaintiff to lockdown where Mezo removed the handcuffs. Woods testified this would be in accordance with prison procedure requiring the shift supervisor to escort an inmate to lockdown since Mezo was the shift supervisor at the time.

Woods could recall no instance of brutality at Camp J. In his opinion, an inmate, even in full restraint, is always a threat. Woods testified he was not familiar with the provisions of the Eighth Amendment to the United States Constitution. However, he stated he would not inflict harm on an inmate except in the line of duty, but in doing his duty would do whatever was necessary, without limitation, to maintain security.

David Lemoine, a medical specialist, testified that he saw the plaintiff on November 1, 1983 at sick call. Plaintiff had some dental complaint at that time. Had the plaintiff complained of a beating causing loose teeth it would have been noted on the sick call sheet. However, the plaintiff appeared to be in no acute distress (NAD) as

is noted on the sick call sheet. Exhibit D-5. Lemoine explained under cross examination that NAD means the observed condition is not life threatening and no immediate attention is required. Lemoine noted on the sick call sheet that the plaintiff had been scheduled for dental call out since July 1983. Lemoine did not notice any swelling or bruises, and if he had, he would have noted it on his sick call sheet, he testified.

While there is conflicting testimony about almost all aspects of this case, the testimony about the use of force is the most divergent. According to the plaintiff, Woods and McMillian, with Mezo's express approval, beat the plaintiff totally without justification or need. This is supported by the testimony of Allen. The plaintiff's injuries were corroborated by Truvia. Needless to say, all of these are convicted felons.

The defendant who testified, Woods, denied that any force whatsoever was used against the plaintiff. The medical records do not show that the plaintiff was sent to the hospital on October 30, 1983. The first medical record entry is November 1, 1983 which notes a problem with the plaintiff's teeth of an unspecified nature. Other defense witnesses denied the plaintiff sought medical attention from them. The plaintiff testified that he repeatedly sought medical attention but was refused. He argued that by refusing his requests, the plaintiff would not be able to produce contemporaneous medical records to document his injuries. Defendants introduced reports by Mezo and McMillian for the limited purpose of showing that they reported an incident, but the court refused to admit the reports for the truth of their contents since

neither defendant testified, and counsel for these defendants did not urge any hearsay exception in support of their admissibility.

Plaintiff did write a letter of complaint to the camp major, Dave Kelone (Exhibit D-1) the same day of the incident, which was received on November 2, 1983, complaining of the beating meted out by Woods and McMillian.

FINDINGS OF FACT

Based on the credibility of the witnesses, the contemporaneous complaint to Kelone (Exhibit D-1), the sick call sheet (Exhibit D-5) and the testimony of the plaintiff, Allen and Truvia, the court finds that defendants Woods and McMillian used force on the plaintiff when there was no need to use any force at all, and that Mezo expressly condoned the use of force in this instance.

The court further finds that the force used resulted in minor bruises and swelling to the plaintiff's face, mouth and lip, and also damaged his partial plate sufficiently to make it unwearable for three to four months. During this time the plaintiff suffered no harm or medically adverse consequences due to the broken plate.

Plaintiff's injuries from the beating were minor and required no medical attention. They healed naturally without medical intervention. Plaintiff was seen by a medical specialist two days after the incident who observed no serious injuries and who felt no treatment was necessary.

APPLICABLE LAW

The focus of a section 1983 claim is on the "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *Monroe v. Pape,* 365 U.S. 167, 184, 81 S.Ct. 473, 482 (1961) quoting *U.S. v. Classic,* 313 U.S. 299, 325-26, 61 S.Ct. 1031, 1043 (1941). To determine whether physical abuse by a prison guard constitutes an abuse of power, the court must consider three factors: the amount of force exerted relative to the need for its application, the extent of injury inflicted; and the motivation of the officers. *Johnston v. Lucas,* 786 F.2d 1254 (5th Cir. 1986); *Williams v. Kelley,* 624 F.2d 695, 697 (5th Cir. 1980), *cert. denied,* 451 U.S. 1019 (1981). While these factors must be considered, it is not necessary that the injury received be severe to constitute a constitutional violation. *U. S. v. Bigham,* ___ F.2d ___ (5th Cir. 1987) (No. 86-2174, March 9, 1987). *See, Wade v. Reed,* 709 F.2d 345 (5th Cir. 1983) (suggesting that any injury suffices where no force is justified). *Compare, Shillingford v. Holmes,* 634 F.2d 263 (5th Cir. 1981) (Fourteenth Amendment claim against city police officer).[1]

Here there was no need to use any force since the plaintiff was already in restraints. Since the plaintiff was

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[1] This is not an isolated assault which arguably would remove the incident from the realm of "punishment" as that term is used in the Eighth Amendment. *George v. Evans,* 620 F.2d 495 (5th Cir. 1980). According to inmate Allen, after defendants Woods and McMillian finished with the plaintiff, they came back, shackled and cuffed Allen and then beat him also on the way to administrative lockdown.

harmed, the only explanation for it is the unnecessary use of force by Woods and McMillian. Mezo did not actually strike the plaintiff, but the credible testimony is that he was present, and in a position to stop Woods and McMillian, but instead acted only to temper their actions. This was an explicit approval of at least a limited beating. The defendants' conduct can only be seen as motivated by malice. All the defendants, by their acts of commission and omission, violated the plaintiff's rights under the Eighth Amendment by the use of unnecessary and excessive force.

Estelle v. Gamble, 429 U.S. 97, 97 S.Ct. 285, 291 (1976), set the standard for proving Eighth Amendment deprivations of medical care: the plaintiff must prove "deliberate indifference to serious medical needs." The essential test is one of medical necessity and not one simply of desirability. *Woodall v. Foti*, 648 F.2d 268, 272 (5th Cir. 1981). The plaintiff proved he was injured, but his injuries were minor and healed without complication. Additionally, the plaintiff was aware of the sick call procedure and used it two days later. There was no proof that Mezo, Woods or McMillian denied the plaintiff access to sick call, even if they did not bring him to the hospital. His injuries were not obviously serious enough to warrant a hospital visit. No defendant deprived the plaintiff of his Eighth Amendment rights insofar as adequate medical care is concerned.

DAMAGES

Plaintiff proved only minor injuries to his back and mouth, and "a strange feeling" when eating for several

months. He expressed no fear that any defendant would repeat the incident, nor did he testify about lost sleep, anxiety or depression caused by the incident. The beating was of short duration. The sum of $800.00 is sufficient to compensate the plaintiff for his injuries.

Plaintiff did not pray for punitive damages in his complaint nor any subsequent pleading. Therefore, the court expresses no opinion on whether this is a proper case for the imposition of punitive damages.

Plaintiff's prayer for injunctive relief is unsupported by any evidence of irreparable harm nor any evidence that this incident was or will be repeated. Injunctive relief is not warranted.

CONCLUSION

Accordingly, judgment will be entered in favor of the plaintiff and against the defendants, in solido, for the sum of $800.00, plus interest from the date of judgment until paid and court costs.

Baton Rouge, Louisiana, April 30, 1987.

/s/ Stephen C. Illegible
UNITED STATES
MAGISTRATE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87-3394
(Summary Calendar)

KEITH J. HUDSON,

Plaintiff-Appellee,

versus

JACK McMILLIAN, CSO III, ET AL.,

Defendants-Appellants.

Appeal from the United States
District Court for the Middle
District of Louisiana (CA-83-1385-A)

(July 31, 1990)

Before POLITZ, DAVIS, and BARKSDALE, Circuit Judges.

PER CURIAM:*

On appeal is a judgment rendered by a magistrate in favor of a prisoner who was physically mistreated by

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

corrections officers. In light of the standards established by this court's intervening decision in Huguet v. Barnett, 900 F.2d 838 (5th Cir. 1990), and progeny, however, we must reverse.

Keith J. Hudson, a Louisiana state prisoner confined to Angola penitentiary invoked 42 U.S.C. § 1983 and sued corrections officers Jack McMillian, Marvin Woods, and Arthur Mezo. The parties consented to disposition of the case by a magistrate, 28 U.S.C. § 636(c). The evidence reflects that on October 30, 1983 Hudson got into an argument with McMillian who punched Hudson in the mouth, eyes, chest, and stomach while Woods held him. The blows cracked Hudson's partial dental plate, split his lower lip and loosened his teeth. He received bruises to his body but no other cuts. Woods kicked Hudson on his backside. Mezo, the supervisor of McMillian and Woods, watched the beating but merely cautioned the officers not to "have too much fun."

Hudson appeared at sick call on October 31 and November 1, 1983 with a dental complaint; his medical record contains no reference to facial bruises or other injuries.

In awarding Hudson a modest judgment the magistrate credited the testimony of Hudson, rejecting that of the officers, and concluded that "defendants Woods and McMillian used force on the plaintiff when there was no need. . . . the force used resulted in minor bruises and swelling to the plaintiff's face, mouth and lip. . . . [p]laintiff's injuries from the beating were minor and required no medical attention." Defendants timely appealed.

This court joins the magistrate in deploring the use of unnecessary force in the treatment of prisoners. Hopefully someday this blight on our criminal justice system will be forever removed. However not every use of excessive force rises to a constitutional violation cognizable under 42 U.S.C. § 1983.

In our recent decision in Huguet v. Barnett we announced the standard to be applied in excessive force claims made by prisoners under the eighth amendment. We there held that to prevail in such a claim four elements must be proven:

1. a significant injury, which
2. resulted directly and only from the use of force that was clearly excessive to the need, the excessiveness of which was
3. Objectively unreasonable, and
4. the action constituted an unnecessary and wanton infliction of pain.

If any one of these elements fails, so too does the plaintiff's claim.

900 F.2d at 841.

In the case at bar no force was required; therefore, the force used was objectively unreasonable. The conduct of McMillian and Woods qualified as clearly excessive and occasioned unnecessary and wanton infliction of pain. Hudson's claim, however, founders on the significant injury prong.

Huguet evolved from our en banc decision in Johnson v. Morel, 876 F.2d 477 (5th Cir. 1989), a fourth amendment excessive-force case. We there held that minor

harms do not rise to constitutional proportions. In awarding recovery the magistrate characterized Hudson's injuries as "minor" and noted that they "required no medical attention." The injuries sustained by Hudson are not unlike those at issue in our recent decision in Wise v. Carlson, 902 F.2d 417 (5th Cir. 1990), which were held not to constitute a significant injury. In Wise the inmate sustained bruises to the anterior chest wall and right forearm and a hematoma to his right upper eyelid. The Wise case injuries were insufficient to base a section 1983 claim; Hudson's injuries are likewise insufficient.

For these reasons the judgment is REVERSED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87-3394

KEITH J. HUDSON,,

Plaintiff-Appellee,

versus

JACK McMILLIAN, CSO III, ET AL.,

Defendants-Appellants.

Appeal from the United States District Court for the Middle District of Louisiana

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ON PETITION FOR REHEARING

(September 4, 1990)

Before POLITZ, DAVIS, and BARKSDALE, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied

ENTERED FOR THE COURT:

/s/ Henry A. Politz
United States Circuit Judge

SUPREME COURT OF THE UNITED STATES

No. 90-6531

Keith J. Hudson,

Petitioner,

v.

Jack McMillian, et al.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

On Consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

April 15, 1991